THE LIMITS OF EFFECTIVE LEGAL ACTION.

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A STUDENT of the political institutions of republican Rome is continually impelled to wonder how any people could carry on a great government under a system involving so much division of authority, so many vetos, so many collegiate magistracies, and so complex a system of checks. In less degree as one studies the British constitution, as it was in the last century, the unwritten constitution, the government by custom and precedent, the respect for traditional lines between authorities and magistracies with large potentialities of theoretical jurisdiction, he can but wonder how an empire could be governed in such loose fashion. Even our American separation of powers and local self governments as they existed in full vigor in the last centuries nowadays awaken similar reflections in the student of political science. And it must be noted that the Roman system was only possible among a homogeneous, law-abiding people, living a simple life, and broke down in the heterogeneous, undisciplined, luxurious world-state of the Roman empire. Likewise the British system shows signs of great strain under the unwonted conditions of the present century, and our own worked much better in rural, agricultural, pioneer America of the nineteenth century than in the urban, industrial America of to-day.

What is true of political institutions is no less true of legal institutions. One can but marvel how the Roman law of Cicero's time, with its crude enforcing agencies, its crude methods of reviewing decisions, its crude methods of instructing tribunals as to the law, could ever have maintained itself, much less have developed into a law of the world. It could not have done so, indeed, except among a disciplined, homogeneous people, zealous to know the law and to obey it. For when men demand little of law, and enforcement of law is but enforcement of the ethical minimum

necessary for the orderly conduct of society, enforcement of law involves few difficulties. All but the inevitable anti-social residuum can understand the simple program and obvious purposes of such a legal system, and enforcement requires nothing more than a strong and reasonably stable political organization. On the other hand, when men demand much of law, when they seek to devolve upon it the whole burden of social control, when they seek to make it do the work of the home and of the church, enforcement of law comes to involve many difficulties. Then few can comprehend the whole field of the law, nor can they do so at one glance. The purposes of the legal system are not all upon the surface, and it may be that many whose nature is by no means anti-social are out of accord with some or even with many of these purposes. Hence to-day, in the wake of ambitious social programs calling for more and more interference with every relation of life, dissatisfaction with law, criticism of legal and judicial institutions, and suspicion as to the purposes of the lawyer become universal.

Complaint of non-enforcement begins, indeed, in primitive law, when political authority is weak and there are persons or groups in the community too masterful for the nascent state to control effectively. This situation does not wholly disappear. Even to-day there are groups which at times prove able to over-awe administrative authorities and to thwart the equal administration of justice. But in general the causes of non-enforcement of law in modern times are more complex. To-day, for the most part, they grow out of over-ambitious plans to regulate every phase of human action by law, they are involved in continual resort to law to supply the deficiencies of other agencies of social control, they spring from attempts to govern by means of law things which in their nature do not admit of objective treatment and external coercion.

Whatever ideas jurists may entertain as to law-making, at present the layman's philosophy of law-making is voluntaristic. The layman believes that law may be made.

He believes that law is a product of the will of the lawmaker. Accordingly, whenever he wills something that he would like to see enforced upon his neighbor, he essays to make law freely. We may grant that there is something to be said for the layman's views as to lawmaking as a needed reaction from the theories of legislative and juristic futility which prevailed in the nineteenth century. We may grant, if you will, that jurists would do well to acquire some part of the modern faith in the efficacy of conscious effort. Very likely if the lawyer were to acquire something of the layman's voluntaristic theory of law-making, and the layman to absorb some of the lawyer's reliance upon finding law and skepticism as to making law, it might be a useful exchange. But that is another story. The point for our present purpose is that the great activity of modern legislatures has made enforcement of law an acute problem. It has compelled us to turn to all manner of new enforcing agencies, such as inspectors, boards and commissions, while at the same time putting a severe strain upon our old enforcing agencies. In the past we have been much concerned with the abstract justice of legal rules but have been concerned little or not at all as to their enforcement. To-day we are almost willing to throw over our hard-won justice according to law in order to bring about speedy and vigorous application of new types of rules securing new interests. For example, modern statutes setting up public service commissions or industrial commissions very generally reject the common-law rules of evidence. Not only this but some of them, at least as interpreted, seem to require commissions to found their awards upon testimony which no common-law court would regard as a sufficient basis for judicial action. Again we are reverting in some degree to the crude methods of rough-and-ready adjustment of controversies imposed on primitive law by the desire for peace at any price. We have to go back to the tariffs of compositions in primitive codes, to such provisions of the beginnings of law as the "for every nail a shilling" of Ethelbert's dooms, to

find an example of mechanical valuings in advance such as form the staple of modern workmen's compensation acts. But our enforcing machinery, staggering under a heavy burden as it is, was not equal to the task of speedy ascertainment of an exact reparation in every case under a novel theory of liability. In other words, the problem how to enforce the law is closely connected with the question how far all that we style law and seek to give effect as law is capable of enforcement; and when we look into the history of the subject we soon come to see that much of this problem of enforcing law is in reality a problem of the intrinsic limitations upon effective legal action.

On other occasions I have sought to generalize certain phenomena of legal history by referring the development of law to four stages and suggesting a fifth stage as the one upon which we are now entering. The first of these stages may be called primitive law. In this stage the religious, the moral and the legal are undifferentiated. Law plays a minor part in social control, seeking only to keep the peace by affording some peaceable substitute for private war. In this stage the state is relatively feeble. The significant social organizations are not political. Kinship is the tie that binds and men are united by the bond of common descent rather than of territorial association. The law, seeking to keep the peace among groups of kindred, which are the units of primitive legal systems, must proceed cautiously. Just as in an industrial dispute to-day we seek peace at any price and resort to all manner of indirect pressure to induce the disputants to arbitrate and thus save the public peace at whatever sacrifice of justice, so primitive law proceeded indirectly to induce households and clans to arbitrate and was content if it averted private war. In the same way the arbitrators in an industrial dispute to-day must make a decision that will go down, and are more anxious to make concessions than to apply principles or to do even justice. Thus in primitive law the limits of effective legal action were a problem of the first importance. In common phrase, it was always a serious question

how far law could "get by." Abstract justice could never be the first consideration. Instead, while law was struggling to establish itself alongside of religion and the internal discipline of the household and the clan as an agency of social control, it was first necessary to consider how far the law could interpose effectively in preventing self-help and keeping the peace. If the law sought to do too much, futile efforts at enforcement but endangered the peace which law sought to maintain at all events. Thus a great deal of primitive law is purely hortatory. Instead of commanding, it exhorts and persuades. In the Anglo-Saxon laws, the king continually calls upon his people as Christians to keep the peace better than they have been wont. Only rarely does he threaten that he and his thanes will arm and ride to the community where a strong-willed and wrong-headed group of kinsmen defy his dooms. Often the law in this stage appeals to religion, as to-day we appeal to the public spirit of the disputants in case of a strike. The old Irish law could only say that if a chief allowed departure from the sound usages laid down from of old, he would bring bad weather upon his country. In the laws of Manu the threats of the law are spiritual, not temporal. Indeed outlawry, the first great weapon of the law, was borrowed from the armory of religion, where it bore the name of excommunication.

A second stage of legal development may be called the strict law. In this stage law has definitely prevailed as the everyday regulative agency in society. Moreover, it has gone beyond the primitive idea of keeping the peace at any cost and seeks to do justice by affording remedies to those who have suffered injury. But fear of arbitrary exercise of the power of granting and applying these remedies produces a system of strict law. The ends sought are certainty and uniformity in the decision of controversies and these ends are attained through rule and form. The cases in which the tribunal will interfere and the way in which it will interfere are defined in an utterly hard and fast manner. The rules are wholly inflexible. In

this stage law and morals are sharply differentiated. The law regards nothing but conformity or want of conformity to its rules; the moral aspect of a situation, the moral aspect of conduct, are thought to be indifferent. Such was the *jus strictum* of the Roman republic, and such was the common law before the rise of the Court of Chancery. This stage of legal development raises no problems of enforcement of law. It requires no consideration of the limits of effective legal action. The law does not attempt to cover the whole field of human relations and of human conduct. It is content to deal with direct and forcible interference with interests of personality, with direct interference with property and possession, and with enforcement of a few of the staple transactions of economic life, when entered into in solemn form. Here the exigencies of rule and form alone prescribe limits. The neglect of enforcement of law, as a fundamental problem of legal science, is largely to be traced to the circumstance that our classical legal writings in all systems take their ideas of law from this stage.

In a third stage of legal development, represented at Rome by the classical period (from Augustus to the third century), in our law by the rise of the Court of Chancery and establishment of equity, and in the civil law by the modernizing of the Roman law under the theory of a law of nature in the seventeenth and eighteenth centuries, there is an infusion into the law of purely moral ideas from without. At Rome the Stoic philosophy, in England the ethical ideas of chancellors who were not common-law lawyers, in Continental Europe the philosophical ideas of political and juristic writers upon the law of nature were resorted to as liberalizing agencies, so that duty was put in place of remedy, reason was relied upon rather than strict rule, and attempt was made to identify the legal with the moral. In this stage the individual human being, as the moral unit, becomes also the legal unit. In all legal systems its distinguishing characteristic is the idea that the legal must be made to coincide at every point with the moral—that

a moral principle simply as such and for that reason is to be also a legal rule. Thus, in a well-known case in the Year Books, when counsel argued to the chancellor that some things were for the law, and for some there was a subpœna in chancery, and some other things were but between a man and his confessor, the archbishop who presided over the tribunal thought it conclusive to answer that the law of his court was in no wise different from the law of God.

Questions of the limits of effective legal action become important once more when the legal system enters upon this stage of the infusion of morals. For in the attempt to treat the moral as legal simply because it is moral, the law ambitiously seeks to deal with the whole field of human conduct; it seeks to regulate every feature of human relations. Thus when the old Roman household had broken down and religion no longer sufficed to hold men to duties enjoined by piety and good morals, the Roman prætor sought to make legal duties out of gratitude, out of reverence for parents, and out of moral obligation toward those through whose bounty a slave had been manumitted. In the same way when the Reformation had taken away the coercive authority of the church and had put an end to its penitential system as an everyday means of social control, the English chancellor, to use the language of Maitland, "screwed up the standard of reasonableness to what many men would regard as an unreasonable height," and exacted a degree of benevolent disinterestedness so ultra-ethical as to require the interposition of Parliament. Both Roman equity and English equity in their flowering time show this tendency to be ethical at the expense of what is practicable; to make over bargains to fit the views of the tribunal as to how they should have been made; to be officiously kind, as Lord Justice James put it, in carrying out what the tribunal thought was good for the parties, even if they had not done it themselves; to make their action depend on the ethical features of the complainant's conduct rather than the legal right of the complainant or the wrong done by his adversary.

Gradually the attempt to make law coincide with morals, to enforce over-high ethical standards and to make legal duties out of moral duties which are not sufficiently tangible to be made effective by legal means, remedied itself. Men soon perceived that it gave too wide a scope to magisterial discretion. For while legal rules are of general and absolute application, moral principles must be applied with reference to circumstances and individuals. Hence at first in this stage the administration of justice was too personal and therefore too uncertain. This over-wide magisterial discretion was corrected by a gradual fixing of rules and consequent stiffening of the legal system. Some moral principles, in their acquired character of legal principles, were carried out to logical consequences beyond what was practicable or expedient, so that a selecting and restricting process became necessary and at length the principles became lost in a mass of somewhat arbitrary rules derived therefrom. Others were developed as mere abstractions, and thus were deprived of their purely moral character. In this way transition took place to the next stage. But note a significant feature of this transition. The tribunal no longer tells us that its law is not other than the law of God. It no longer seeks to add legal sanction to the whole body of moral principles simply because they are moral. The legal field has again become a limited one, defined by rules, not an unlimited one capable of indefinite extension to cover all things within the reach of the moral zeal of the magistrate.

We may call the fourth stage of legal development, which results from reaction from the identification of law and morals, the maturity of law. In this stage, which is represented in both the great legal systems of the world by the nineteenth century, equality and security are the watchwords. To insure equality, the maturity of law insists upon certainty and consequently upon rules. To insure security, it insists upon property and contract as fundamental ideas. Thus in some measure it reverts to the methods of the strict law. What the latter sought through a system of

remedies it seeks through a system of individual rights. Where the former sought to achieve certainty through inflexible rules, it seeks the same end through logical reasoning from fixed conceptions. In this stage also, as in the stage of the strict law, there is no need to trouble about the limits of effective legal action. Once more the law has a definite program, namely, to secure certain fundamental individual interests by delimiting them and enforcing legal rights coincident with the interests so recognized and delimited; and it is quite content to leave all other aspects of human conduct and all other human relations to such extra-legal agencies of social control as may be adapted to deal with them.

Hence in the nineteenth-century period of maturity and stability, all jurists agreed in ignoring questions of enforcement. The analytical school, regarding law as the command of the sovereign, conceived that enforcement was no concern of the jurist. If law was not enforced, it meant simply that the executive machinery was at fault. The historical school, thinking of law as an expression of the experience of a people in administering justice or as an unfolding in that experience of a metaphysical principle of justice, likewise held all questions of enforcement to be irrelevant. For the very existence of a rule of the common law showed that it was efficacious, and as to legislation, the historical jurist conceived that it attempted to make what could only be found, and hence was futile anyway. To the philosophical school there was but one question, namely, was the rule of law abstractly just? If so, they conceived it had a sufficient basis in its inherent justice and that the appeal to the conscience made by its accord with abstract and ideal justice must insure its efficacy in practice. Such ideas persisting into a period of legal expansion and copious law-making have much to do with the divergence between the law in the books and the law in action which is so marked in this country to-day.

I have already suggested that the maturity of law has much in common with the stage of the strict law. In con-

sequence a certain opposition between law and morals develops once more, and just as the neglect of the moral aspects of conduct in the stage of strict law required the legal revolution, through infusion of lay moral ideas into law, which we call the stage of equity or natural law, so the neglect of the moral worth of the individual and of his claim to a complete moral and social life, involved in the insistence upon property and contract in the maturity of law, are requiring a similar revolution through the absorption into the law of ideas developed in the social sciences. Thus, as the strict law and the maturity of law are comparable in many ways, so the stage of equity or natural law and the stage of legal development upon which we are entering have much in common.

Compare, for example, the legislative limitations upon freedom of contract which are becoming so common to-day, with the limitations imposed upon contract by the chancellor. The common law enforced a penal bond, the chancellor enjoined enforcement beyond the actual damage. The common law enforced the condition of a mortgage according to the agreement of the parties; the chancellor allowed redemption after the condition had become absolute. The common law allowed men of full age and capacity to make their own bargains; the chancellor would not suffer a debtor to clog his equity of redemption and made over bargains for impecunious heirs and reversioners. Thus equity insisted on moral conduct on the part of creditors and lenders. To-day we insist on social conduct on the part of owners and employers. But this is only another way of putting the same thing. For a season society extends to certain classes a protection against themselves in order to secure the social interest in the full moral and social life of every individual. Again, just as equity restrained the unconscientious exercise of legal rights and legal powers, the legislation of to-day is limiting the power of an owner to dispose of his property, in order to secure the interests of those who are dependent upon him. The power of the legal owner of the family home was first

to be restricted. But to-day more than one jurisdiction restricts the power of the husband to mortgage the household furniture bought with his own money and legally his, or to assign his own wages, earned by his own toil. Again, the present, like the stage of equity or natural law, is, in comparison with the maturity of law and the strict law, a period of reversion to lawless justice. The certainty of law, of which we were so confident in the last century, is no longer assured. Many parts of the law are in a state of flux. Experiments of all sorts are in the air, and all manner of administrative tribunals, proceeding summarily upon principles yet to be defined are acquiring jurisdiction at the expense of the courts. The rising Court of Chancery, the King's Council, the Star Chamber, the Court of Requests, and all the administrative organs of justice in Tudor and Stuart England, have their analogies in twentieth century America. The sixteenth century serjeant at law who complained that the chancellor set aside the law of the king's court because he was not acquainted with the common law, neither with the goodness thereof, would sympathize with complaints that may be heard at the meeting of any state bar association to-day.

Thus once more the law has an ambitious program of covering the whole range of human relations. Once more we have faith in the efficacy of effort to do things by law. As the chancellor would have the law of his court in no wise different from the law of God, and hence sought to make all moral duties into legal duties, so to-day the lawmaker would protect all the wider human interests which are clamoring for recognition by putting legal rules behind them and would enact into law everything which an enlightened social program indicates as a desirable ideal. Accordingly we begin to hear complaint that laws are not enforced and the forgotten problem of the limitations upon effective legal action once more becomes acute. Complaint of nonenforcement of law is nothing new. It is as old as the law and has been heard in this country from the beginning. But it is significant that in America such complaint has been

heard chiefly in connection with the extravagant translations of Puritanical ideas of conduct into penal codes, known as blue laws, and the voluminous social legislation of to-day. It is significant also that the world over such complaint has been heard chiefly in periods when the law was seeking ambitiously to cover the whole field of social control, or in transitions to such periods. It is not an accident that the problem of application and enforcement of law has come to be regarded as the central one in the legal science of Continental Europe. If Anglo-American jurists are still thrashing the old straw of disputes as to the nature of law we must not be deceived. Those who must keep their eyes upon the law in action are discussing application and enforcement no less than the jurists of Europe. Such non-legal volumes as the proceedings of the Association for Labor Legislation and of the National Conference of Charities and Corrections tell the true tale of the significant question for the legal science of to-day. It is not a mere academic exercise therefore to set forth analytically the limitations inherent in administration of justice according to law, which preclude the complete securing through law of all interests which ethical considerations or social ideals indicate as proper to be secured.

One set of limitations grows out of the difficulties involved in ascertainment of the facts to which legal rules are to be applied. This is one of the oldest and most stubborn problems of the administration of justice. In primitive law there was the danger that debate over the facts would take the form of the very private war which the law was seeking to put down. Hence the law sought to settle the facts by some mechanical device—by ordeal, or casting lots, or even battle by champions—in other words, by some conclusive test that involved no element of personal judgment on the part of the magistrate and could not be challenged for partiality. The strict law relied on procedural forms for the same reason. Forms prevented dispute. The form was fixed and notorious. Men's ideas might differ as to whether there was something novel,

called a substantial right, contained in or behind the form, and if so, as to what it was. But the form allowed no scope for such disputes, and in the beginnings of a legal system as well as in the primitive stage, a chief end is to avoid dispute. In any age or in any place where men are inclined on slight provocation to take the righting of wrongs into their own hands, the law that hesitates is lost. In time the legal system develops a rational mode of trial. Yet trial by jury was at first purely mechanical. And while we should not agree with the Year Books speaking from the days of verdicts on the common knowledge of the vicinage that a man's intent or a woman's age cannot be ascertained by legal trial, the exigencies of trial by jury impose many limitations upon legal securing of important interests. For example, the law is often criticised because it does not protect against purely subjective mental suffering except as it accompanies or is incident to some other form of injury and within disputed limits even then. There are obvious difficulties of proof in such cases. False testimony as to mental suffering may be adduced easily and is very hard to detect. Hence the courts, constrained by the practical problem of proof to fall short of the requirements of the logical system of rights of personality, have looked to see whether there has been some bodily impact or some wrong infringing some other interest which is objectively demonstrable, and have put nervous injuries which leave no bodily record and purely mental injuries in the same category.

Another set of limitations grows out of the intangibleness of duties which morally are of great moment but legally defy enforcement. I have spoken already of futile attempts of equity at Rome and in England to make moral duties of gratitude or disinterestedness into duties enforceable by courts. In modern law not only duties of care for the health, morals and education of children, but even truancy and incorrigibility are coming under the supervision of juvenile courts or courts of domestic relations. But note that the moment these things are committed to

courts administrative agencies have to be invoked to make the legal treatment effective. Probation officers, boards of children's guardians and like institutions at once develop. Moreover one may venture to doubt whether such institutions or any that may grow out of them will ever take the place of the old-time interview between father and son in the family woodshed by means of which the intangible duties involved in that relation were formerly enforced.

A third set of limitations grows out of the subtlety of modes of seriously infringing important interests which the law would be glad to secure effectively if it might. Thus grave infringements of individual interests in the domestic relations by tale-bearing or intrigue are often too intangible to be reached by legal machinery. Our law has struggled hard with this difficulty. But the result of our action on the case for criminal conversation and alienation of affections, which long ago excited the ridicule of Thackeray, do not inspire confidence nor does the sole American precedent for enjoining a defendant from flirting with the plaintiff's wife assure a better remedy. So also with the so-called right of privacy. The difficulties involved in tracing injuries to their source and in fitting cause to effect compels some sacrifice of the interests of the retiring and the sensitive.

A fourth set of limitations grows out of the inapplicability of the legal machinery of rule and remedy to many phases of human conduct, to many important human relations and to some serious wrongs. One example may be seen in the duty of husband and wife to live together and the claim of each to the society and affection of the other. Formerly, so far as the husband was concerned, our legal system secured this interest in three ways, namely, by a marital privilege of restraint and correction, by a suit for restitution of conjugal rights, and by a writ of *habeas corpus* directed to one who harbored the wife apart from her husband. But the privilege of restraint and correction is incompatible with the individual interests of personality of the wife and is no longer recognized. The suit for

restitution of conjugal rights, in origin an ecclesiastical institution for the correction of morals, sanctioned by excommunication, has long been practically inefficacious and is now obsolete. And the writ of *habeas corpus* may now be used only when the wife is detained from the husband against her will. To-day this interest has no sanction beyond morals and the opinion of the community. This was true also in the classical Roman law, and in modern countries ruled by the Roman law, as in those that are ruled by the common law, the chief security for the interest of husband and wife in the marital relation is simply the moral sense of the community. So little has been achieved in practice by the husband's actions against third parties who infringe this interest, tested in the law by centuries of experience, that the courts have instinctively proceeded with caution in giving them to the wife by analogy in order to make the law logically complete.

Law secures interests by punishment, by prevention, by specific redress and by substitutional redress; and the wit of man has discovered no further possibilities of judicial action. But punishment has of necessity a very limited field and to-day is found applicable only to enforce absolute duties imposed to secure general social interests. The scope of preventive relief is necessarily narrow. In the case of injuries to reputation, injuries to the feelings and sensibilities—to the "peace and comfort of one's thoughts and emotions"—the wrong is ordinarily complete before any preventive remedy may be invoked, even if other difficulties were not involved. Specific redress is only possible in case of possessory rights and of certain acts involving purely economic advantages. A court can repossess a plaintiff of Blackacre, but it cannot repossess him of his reputation. It can make a defendant restore a unique chattel, but it cannot compel him to restore the alienated affections of a wife. It can constrain a defendant to perform a contract to convey land, but it cannot constrain him to restore the peace of mind of one whose privacy has been grossly invaded. Hence in the great majority of cases

substitutional redress by way of money damages is the only resource and this has been the staple remedy of the law at all times. But this remedy is palpably inadequate except where interests of substance are involved. The value of a chattel, the value of a commercial contract, the value of use and occupation of land—such things may be measured in money. On the other hand attempt to reach a definite measure of actual money compensation for a broken limb is at least difficult; and valuation of the feelings, the honor, the dignity of an injured person is downright impossible. We try to hide the difficulty by treating the individual honor, dignity, character and reputation, for purposes of the law of defamation, as assets, and Kipling has told us what the Oriental thinks of the result. "Is a man sad? Give him money, say the Sahibs. Is he dishonored? Give him money, say the Sahibs. Hath he a wrong upon his head? Give him money, say the Sahibs." It is obvious that the Oriental's point is well taken. But it is not so obvious what else the law may do. If, therefore, the law secures property and contract more elaborately and more adequately than it secures personality, it is not because the law rates the latter less highly than the former, but because legal machinery is intrinsically well adapted to securing the one and intrinsically ill adapted to securing the other.

Finally, a fifth set of limitations grows out of the necessity of appealing to individuals to set the law in motion. All legal systems labor under this necessity. But it puts a special burden upon legal administration of justice in an Anglo-American democracy. For our whole traditional polity depends on individual initiative to secure legal redress and enforce legal rules. It is true, the ultra individualism of the common law in this connection has broken down. We no longer rely wholly upon individual prosecutors to bring criminals to justice. We no longer rely upon private actions for damages to hold public service companies to their duties or to save us from adulterated food. Yet the possibilities of administrative enforcement of law are limited also, even if there were not grave ob-

jections to a general régime of administrative enforcement. For laws will not enforce themselves. Human beings must execute them, and there must be some motive setting the individual in motion to do this above and beyond the abstract content of the rule and its conformity to an ideal justice or an ideal of social interest. The Puritan conceived of laws simply as guides to the individual conscience. The individual will was not to be coerced. Every man's conscience was to be the ultimate arbiter of what was right and wrong at the crisis of action. But as all men's consciences were not enlightened, laws were proper to set men to thinking, to declare to them what their fellows thought on this point and that, and to afford guides to those whose consciences did not speak with assurance. Such a conception, suitable enough in a sparsely settled community of pioneers, is quite impossible in the crowded industrial community of to-day with its complex organization and clash of conflicting interests. Yet many still think of law after the Puritan fashion. One social reformer told us recently that the real function of law is to register the protest of society against wrong. Well, protests of society against wrong are no mean thing. But one may feel that a prophet rather than a law-maker is the proper mouthpiece for the purpose. It is said that Hunt, the agitator, appeared on one occasion before Lord Ellenborough at circuit, *a propos* of nothing upon the calendar, to make one of his harangues. After the Chief Justice had explained to him that he was not in a tribunal of general jurisdiction to inquire into every species of wrong throughout the kingdom but only in a court of assize and jail delivery to deliver the jail of that particular county, Hunt exclaimed, "But, my Lord, I desire to protest." "Oh, certainly," said Lord Ellenborough. "By all means. Usher! Take Mr. Hunt into the corridor and allow him to protest as much as he pleases." Our statute books are full of protests of society against wrong which are as efficacious for practical purposes as the declamations of Mr. Hunt in the corridor of Lord Ellenborough's court.

Much advance has been making of late in the art of drafting legislation and in the study of comparative legislation. But in an age of legislative law-making much more is required. The life of law is in its enforcement. The common-law rule came into being through enforcement and application and the situations that brought about its existence determine its life. The statutory rule, on the other hand, is made *a priori*. It is not necessarily a living rule when it is put upon the books. Occasion to apply it judicially may not arise till long afterward. Morever it is an abstract rule and the situation that led to its existence goes rather to its interpretation than to its validity as a rule. Hence it is not enough for the law-maker to study the form of the rule and the abstract justice of its content. He must study how far cases under the rule are susceptible of proof. He must study how far by means of his rule he may set up a tangible legal duty capable of enforcement objectively by legal sanctions. He must consider how far infringements of his rule will take on a palpable shape with which the law may deal effectively. He must study how far the legal machinery of rule and remedy is adapted to effect what he desires. Last and most of all he must study how to insure that someone will have a motive for invoking the machinery of the law to enforce his rule in the face of the opposing interests of others in infringing it.

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